IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.33 OF 2007
WITH
CIVIL APPLICATION NO.55 OF 2007

Acharya Ashram Co-op. Housing
Society Ltd. ..Appellant.

V/s.

Shree Ganesh Gramastha Sewa Mandal
a Public Trust & Ors. ..Respondents.

Mr.V.A.Thorat, Sr.Advocate with Shri Rahul Chitnis i/b M/s.V.Deshpande & Co. for appellant.

Mr.J.Reis with Smt. Sheetal D. Mishra for respondent No.1 to 12.

Mr. R.A.Malandkar for Respondent No.13-BMC.

CORAM: A.M.KHANWILKAR,J

DATE : JANUARY 29, 2007.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Reis waives notice for respondent Nos. 1 to 12. Mr. Malandkar waives notice for Respondent No.13-BMC.

4. As short question is involved, appeal is taken up for final hearing forthwith by consent.

5. This appeal takes exception to the Judgment and order passed by the City Civil Court, Bombay dated 21st December, 2006 in Notice of Motion No.4727 of 2006 in Short Cause Suit No.5134 of 2006. The trial Court passed following order, which is impugned in this appeal:

> "**O R D E R**
>
> Notice of Motion no.4727/06 is made absolute as under:
>
> Defendant No.1 is hereby restrained from entering upon or putting upon or carrying out any construction on the portion of the land boundary shown by the red colour in the plaint at Exh."B till the decision of the suit.
>
> Defendant No.2 is restrained from sanctioning the building plan in respect of the portion of the land which is in possession of the plaintiffs without giving opportunity to the plaintiffs to take part in the proposal submitted by the defendant No.1 till the decision of the suit.
>
> Costs in cause."

The appellant/original defendant No.1 would contend that the Court below has granted mandatory injunction against them by restraining them to enter upon or put upon or carry out any construction on the portion of the suit property; that too without recording any adequate reason to justify such drastic order.

Besides, it is contended that the trial Court has not even adverted to the argument canvassed on behalf of the appellant that the suit itself was not maintainable and if so, the question of granting any interim relief in favour of the plaintiffs does not arise. It is lastly contended that although the appellant/defendant made specific reference to the fact that the Memorandum of Understanding, on which reliance was placed by the plaintiffs, was terminated by the appellant/defendant and to substantiate that position documents such as resolution dated 19th August, 2006, intimation sent alongwith copy of the resolution dated 31st August, 2006, reply sent by the plaintiff dated 18th September, 2006 were relied by the appellant/defendant. Those documents, as well as reference made to these documents in the reply filed before the trial court, have not been adverted to in the impugned Judgment, while answering the point in issue.

6. Counsel for the respondents/plaintiffs would however, support the decision, which is the subject matter of challenge in this appeal. According to him, factum of possession is spelt out from the Memorandum of Understanding executed between the parties, which clearly refers to the fact that the

plaintiffs were put in possession of the suit property. Reference is made to other clauses of Memorandum of Understanding.

7. Even so, the primary question that ought to have been considered by the trial Court was: whether the suit simplicitor for injunction as filed by the plaintiffs was maintainable, which was specifically raised in the reply filed on behalf of the defendant. That has not been considered by the lower Court at all. Besides, the trial Court has not even adverted to the specific stand taken by the appellant/defendant about the termination of the Memorandum of Understanding and consequential correspondence between the parties. For these reasons, the Judgment under appeal cannot be sustained.

8. The appropriate course, in my opinion, is to relegate the parties before the trial Court to reconsider all aspects of the matter afresh in accordance with the law.

9. It will be open to the respondents/plaintiffs to take out appropriate application, as may be advised, for amendment of pleadings or further

reliefs. That application will have to be considered on its own merits in accordance with the law. It will be open to the appellant/defendant to resist such application on the argument that no leave under Order 2 Rule 2 was taken in the earlier point of time.

10. Be that as it may, suffice it to observe that the Judgment and Order under appeal will have to be set aside and the Notice of Motion restored to the file of the trial Court, leaving all questions to be decided by the trial Court afresh on its own merits, in accordance with the law.

11. Accordingly, the impugned Judgment and order is set aside. The Notice of Motion is remanded back to the trial Court to be considered in view of the above observations. Notice of Motion be listed before the trial Court on 15th February, 2007, on which date the trial Court may proceed to hear the said motion or on such other date, as may be convenient, to be disposed of preferably by end of April, 2007.

12. If any application is taken out by the plaintiffs for amendment of the plaint, the same be

considered on its own merits in accordance with the law. It is agreed between the parties that the interim arrangement ordered to be maintained during the pendency of this appeal will be continued till the disposal of the Notice of Motion. Counsel for the plaintiffs assures that proposed application for amendment of the plaint will be taken out within one week from today. That assurance is accepted.

13. Appeal as well as civil application disposed of on the above terms.